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EXAMINER

BOGART, MICHAEL G

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/800,176
Filing Date: March 12, 2004
Appellant(s): FARBROT ET AL.

MAILED
OCT 11 2007
Group 3700

Travis D. Boone
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 05 June 2007 appealing from the Office action mailed 05 December 2007.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

US 5,635,191 A	Roe <i>et al.</i>	6-1997
US 6,168,782 B1	Lin <i>et al.</i>	1-2001
US 6,187,990 B1	Runeman <i>et al.</i>	2-2001
US 4,934,535	Muckenfuhs <i>et al.</i>	1-1990

(9) Grounds of Rejection

Claim Rejections – 35 USC § 103

The following is a quotation of 35 U.S.C. § 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. § 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. § 103(c) and potential 35 U.S.C. § 102(e), (f) or (g) prior art under 35 U.S.C. § 103(a).

Claims 1-4, 6-12, 14-16 and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Roe *et al.* (US 5,635,191 A; hereinafter "Roe") in view of Lin *et al.* (US 6,168,782 B1; hereinafter "Lin").

Regarding claim 1, Roe, teaches an absorbent article (50) having a topsheet (520) having a polysiloxane gel/lotion/emollient that functions as a carrier for an additive such as a pharmaceutical agent or odor inhibitor (see abstract; col. 11, line 43-col. 12, line 45; col. 18, lines 30-40).

Roe does not disclose expressly the specific cross-linked three-dimension structure or hydrophobic substance.

Lin teaches cross-linked three-dimensional gelled networks of polysiloxane, an active ingredient such as a vitamin, and a hydrophobic substance (oil). The combined composition is useful in personal, health care applications and personal hygiene. The silicone gel chemically bonds to the active ingredient which provides an avenue for entrapping vitamins personal care products and for controlling the release of active ingredient in delivery systems (abstract)(col. 1, lines 36-46; col. 1, line 66-col. 2, line 21; col. 2, line 56-col. 3, line 12; col. 8, lines 53-63).

At the time of the invention, it would have been obvious for one of ordinary skill in the art to replace the polysiloxane emollient of Roe with the elastomeric silicone of Lin in order to provide an effective active ingredient and oil retention and delivery mechanism.

Additionally, the claim would have been obvious because the substitution of one known element for another would have yielded predictable results to one of ordinary skill in the art. See *In re Fout, Mishkin, and Roychoudhury*, 213 USPQ 532 (C.C.P.A. 1982).

Regarding claims 2-4, 9 and 10, mere changes in the relative dimensions of elements is not sufficient to patentably distinguish an invention over the prior art. See *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

Regarding claim 6, Lin teaches that the active ingredient can be an odor inhibitor (col. 7, lines 36-46; col. 8, lines 37-46).

Regarding claim 7, Lin teaches that the additive also constitutes an agent for swelling the three-dimensional network (col. 3, lines 5-8).

Regarding claims 8 and 11, Lin teaches that the components of the silicone elastomer have a loosely cross-linked structure (abstract). This would inherently produce a net or latticed structure. Regarding the term “loosely”, this is a relative term that is not defined by applicants’ specification. As such, the structures in Lin are interpreted herein as being loosely cross-linked.

Regarding claim 12, Lin teaches that release of the additive by the silicone gel is activated by diffusion, water or shearing forces (col. 1, lines 36-46; col. 3, lines 5-8; col. 9, lines 30-57).

Regarding claim 14, Lin teaches a glue (bond forming compound)(α,ω -unsaturated hydrocarbon/catalyst) mixed with the polysiloxane (abstract; col. 1, line 66-col. 2, line 16).

Regarding claim 15, Roe teaches that the gel is mixed with the surface layer (520).

Regarding claims 16, Roe teaches a method of providing an additive to an absorbent article such as an incontinence device, including the steps of providing a polysiloxane gel to an absorbent article such as a diaper (col. 1, lines 7-15; col. 18, line 30-col. 20, line 11).

Regarding claim 18, Roe teaches an incontinence device (50)(diaper).

Claims 5 and 17 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Roe and Lin as applied to claims 1-4, 6-12, 14-16 and 18 above, and further in view of Runeman *et al.* (US 6,187,990 B1; hereinafter “Runeman”).

Roe and Lin do not teach lactobacilli as an additive.

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Runeman teaches an absorbent article that uses lactobacilli as an additive to prevent unpleasant odors (col. 4, lines 14-35).

At the time of the invention, it would have been obvious to one of ordinary skill in the art to select the lactobacilli additive of Runeman in the absorbent article of Roe and Lin in order to provide an effective odor reducing agent.

Additionally, the claim would have been obvious because the substitution of one known element for another would have yielded predictable results to one of ordinary skill in the art. See *In re Fout, Mishkin, and Roychoudhury*, 213 USPQ 532 (C.C.P.A. 1982).

Claim 13 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Roe and Lin as applied to claims 1-4, 6-12, 14-16 and 18 above, and further in view of Muckenfuhs *et al.* (US 4,934,535; hereinafter "Muckenfuhs").

Roe and Lin do not teach a detachable protective layer.

Muckenfuhs teaches a package/covering (10) for a diaper.

At the time of the invention, it would have been obvious to one of ordinary skill in the art to employ the package of Muckenfuhs to contain the diaper of Roe and Lin for retail sale.

Additionally, all the claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions, and the combination would have yielded predictable results to one of ordinary skill in the art at the time of the invention. *KSR International Co. v. Teleflex Inc.*, 550 U.S. ___, 82 USPQ2d 1385, 1396 (2007).

(10) Response to Arguments

Applicant's arguments filed 05 June 2007 have been fully considered but they are not persuasive.

Applicants assert that one skilled in the art would not substitute the elastomeric silicone of Lin for the polysiloxane emollient of Roe. In support of this, applicants assert that the elastomeric silicone of Lin has a cross-linked three-dimensional network and functions as a relatively rigid structure for containing a hydrophobic structure comprising an additive. Applicants further assert that the additive is transferred to the skin, but the elastomeric silicone of Lin will stay on the absorbent article. Further, applicants add that if any of the elastomeric silicone of Lin were to be incidentally transferred to the user's skin, it will not have "soothing, moisturizing, and lubricating" effects on the skin. This argument is not persuasive because Roe teaches an absorbent article that in at least one embodiment, has a lotion having additive materials, such as perfumes, antibacterial actives, deodorants, etc. that can be transferred to the skin of a wearer (col. 18, lines 30-40). Substituting Roe's emollient with the elastomeric silicone of Lin does not change this functionality, even if other functions of Roe are changed. The elastomeric silicone of Lin would still allow these materials to be transferred to the wearer's skin. Furthermore, Lin teaches an oil which can perform the soothing, moisturizing and lubricated function of the emollients of Roe.

Regarding applicants arguments concerning the additional rejections under Runeman and Muckenfuhs, applicants have merely stated that they do not cure the deficiencies of Roe and Lin. In response, see the immediately preceding paragraph.

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(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

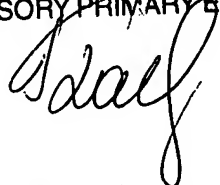


Michael Bogart

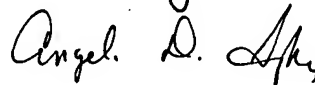
Conferees:

Tatyana Zalukaeva

TATYANA ZALUKAEVA
SUPERVISORY PRIMARY EXAMINER



Angela Sykes



ANGELA D. SYKES
SUPERVISORY EXAMINER
TECHNOLOGY CENTER